No. 103.

Brf. of Prouty for Appellee.

Office Supreme Court U. S.
FILED
NOV 19 1898
JAMES H. McKENNEY,
Clerk.

Filed Nov. 19, 1898.

Supreme Court of the United States.

OCTOBER TERM, 1898.

No. 103.

UNITED STATES, APPELLANT,

vs.

FRANK DUDLEY, APPELLEE.

BRIEF FOR THE APPELLEE.

C. A. PROUTY,
Of Counsel.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C. 11-17-'98

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1898.

No. 103.

UNITED STATES, APPELLANT,

vs.

FRANK DUDLEY, APPELLEE.

BRIEF FOR THE APPELLEE.

The question in this case arises upon the classification of certain importations under the tariff act of August 28, 1894. The articles were eight car-loads of spruce lumber. One car-load consisted of boards one inch in thickness, four and five inches in width, and from twelve to sixteen feet in length. They were planed on one side and tongued and grooved. The second car-load consisted of plank two inches in thickness, from six to ten inches in width, sixteen feet long. The third car-load was of plank three inches thick, from six to nine inches in width, sixteen feet long. The foregoing two cars of plank were planed on one side and

tongued and grooved. The remaining five cars consisted of plank three inches in thickness, from six to eleven inches in width, and ten, sixteen, and twenty feet in length. These were planed on one side and grooved (Record, pp. 6, 7, 8).

The collector assessed a duty of 25 per cent. *ad valorem* upon these importations under paragraph 181, Schedule D, which fixes that the rate upon "house or cabinet furniture of wood, wholly or partly finished, manufactures of wood, or of which wood is the component material of chief value, not specially provided for in this act." The appellee contended that these imports were entitled to entry free of duty under the provisions of paragraph 676, which provides for "sawed boards, plank, deals, and other lumber, rough or dressed." The duties were paid under protest and the protest considered by the Board of United States General Appraisers, who sustained the action of the collector. Thereupon the appellee began proceedings in the circuit court of the United States to correct the action of the Board of General Appraisers, which resulted in a decree of the circuit court reversing the classification of the collector and holding that the imports should have been classified under paragraph 676. From this decision the Government appealed to the United States circuit court of appeals for the second circuit. In that court the case was heard before two judges who were divided in opinion, and the decree of the circuit court was thereupon affirmed.

The only question is whether these importations should have been classified under paragraph 676; in other words, whether they were dressed lumber.

The claim of the appellee is this: All lumber is divided into two general classes—rough and dressed. Rough lum-

ber is lumber as it comes from the saw; dressed lumber is lumber as it comes from the planing machine.

Sawed lumber is divided into many subordinate classes, like rafters, floor joist, fence boards, barn boards, &c., the name indicating the purpose for which lumber of that particular size and shape is especially adapted and the use to which it is ordinarily put. In the same way dressed lumber is divided into various classes, like flooring, sheathing, ceiling, &c. Here, too, the name indicates the purpose to which lumber dressed in that particular way is ordinarily put.

These facts are testified to more or less in detail by all the witnesses of the appellee. Perhaps the testimony of Mr. Ford is as full in this respect as that of any witness (Record, p. 162). The facts testified to by Mr. Ford and the other witnesses for the appellee are not controverted by those for the Government, except as to the use of the word "dressed." They assert, apparently, that this word refers merely to the smoothing of one or both sides of the lumber; that dressed lumber is lumber of which one or both sides has been planed; that when anything more is done to it, like tonguing and grooving the edges, or grooving the edges, as in case of these importations, it then passes beyond what is known in the trade as "dressed lumber" and becomes something else. The contention of the appellee is that "dressed" is a broad and comprehensive term, as used in paragraph 676, embracing whatever is done to the lumber in passing it through the planing machine, while the Government contends that it has a narrow signification and refers simply to the surface planing of one or both sides.

I.

The word "dress" as applied to lumber is used in two senses—everywhere in the broad and popular sense contended for by the appellee and in some sections in the narrow sense claimed by the Government.

Among other definitions given by Worcester's Dictionary for the word "dress" is this: "To prepare for any purpose; to fit for use." The Century Dictionary gives the following definition, among others: "5. To prepare or make ready; treat in some particular way and thus fit for some special use or purpose." And as explanatory of the above the following illustration is given: "(*d*) To cut or reduce to the proper shape or dimensions, or evenness of surface, as by planing, chiseling, tooling, &c.; trim; finish off; put the finishing touches to; as to dress timber; to dress a millstone."

The record in this case contains the testimony of forty-seven witnesses, twenty-three of whom were produced by the appellee and twenty-four by the Government. The twenty-three witnesses of the appellee all testified that the word "dress" as applied to lumber is used in the broad sense of to prepare for some special use. Flooring is lumber dressed for the purpose of being laid into floors; ceiling for the purpose of putting up the ceilings of rooms, &c.

The twenty-four witnesses of the Government all testified in substance that "dress" is applied only to the process of smoothing one or both sides of the lumber and bringing it to an even thickness. This comes, in substance, to saying that "dress" and "plane" are synonymous terms.

The witnesses upon both sides are persons of intelligence and standing. Those who have testified in behalf of the Government are, for the most part, interested in extensive establishments devoted to the dressing of lumber in various ways, and they, of course, had a vital interest in securing that interpretation of the tariff for which they were moving. While, however, this might color to some extent their testimony, it is not to be suggested that they would for that reason state as a fact what was absolutely without foundation. The fair and reasonable inference from all this testimony is that the word "dress" is used in both senses. It is sometimes and in some sections used as a synonym for the word "plane;" it is everywhere used in the broad sense contended for by the appellee.

There are many things in the testimony of the Government itself which show that the word is used in both senses. Oscar C. Miller is one of the twenty-four. He testified, among other things, as follows:

"Direct examination:

"Q. Were you familiar with the words 'dressed lumber' as used in the lumber trade at the time of the passage of the tariff act in August, 1894, and prior thereto and at the present time?

"A. I think we used the word 'plane' more than we did 'dressed.'

"Q. You regard those two terms as synonymous?

"A. I do; yes, sir."

* * * * * * *

"Cross-examination:

"Q. You say that you understand the word 'planed' and the word 'dressed' as being synonymous?

"A. As meaning one and the same thing as applied to lumber.

"Q. Has the term 'dressed' as applied to lumber a general, broad significance?

"A. Well, I am inclined to think it has in the same sense that you use the word 'lumber.'"

Record, p. 152.

D. W. Robinson, another of the twenty-four, testified, upon cross-examination, in speaking of the purpose for which flooring was tongued and grooved, as follows:

"Q. What is the purpose of putting on those sides there—tonguing and grooving?

"A. To keep the flooring down, I suppose. What do you mean?

"Q. What is the purpose of putting that on?

"A. To manufacture that for an article of commerce known as flooring.

"Q. Is that the only purpose?

"A. That is the only purpose I know of.

"Q. Is it not the purpose to fit that for a particular purpose—that is, to wit, a flooring, just the same as you smooth it?

"A. Yes, sir; of course.

"Q. Supposing you jointed it instead of that, what would that be?

"A. In some sections we *dress* flooring that way."

Record, p. 156.

It appears, therefore, that Mr. Robinson used the word "dress" as applicable to the process of fitting the rough board for flooring.

The order for the first car-load of lumber involved in this case called for one car-load of planed and matched boards, "dry and well dressed" (Record, p. 6). That expression was used by the customer without any reference to this suit. Can there be any question that the word "dressed" applied to the whole process, the tonguing and grooving of the edges as well as the smoothing of the surface, and that it was properly so applied?

II.

This is not a question of trade names.

It is not claimed that lumber is bought and sold as "dressed lumber" simply. To order a car-load of dressed lumber would mean nothing more than it would to order a car-load of rough lumber.

This was so held by the circuit court (Record, p. 178).

If this were a question of trade names the commercial or trade designation would not prevail over the popular meaning unless it were definite, uniform, and general. This case presents no one of those elements.

Maddock *vs.* Magone, 152 U. S., 368.

III.

The importations were lumber.

All the witnesses, with possibly one or two exceptions, agree about this. These boards and planks have all the incidents of lumber. They are known in the trade as lumber, advertised as lumber, handled as lumber, shipped as lumber, bought and sold by the thousand feet like lumber. This general proposition, about which no question is made, should be kept firmly in mind.

IV.

The work on these importations necessary to bring them from the sawed boards or planks to the condition in which they were imported was all done as part of one process by passing the boards or planks through one machine a single time.

There is no serious dispute about this. Some of the Government witnesses appeared to intimate that the process of matching is a further process, which takes place after the lumber is planed. Thus Mr. Loomis testifies:

"Q. Look at Exhibit 1.
"A. Yes, sir.
"Q. To what class of lumber would you state that belonged?
"A. Flooring, tongued and grooved. This lumber is first dressed, and then passed on and is tongued and grooved. It is not done by the same cylinder.
"Q. Is the process of planing and tonguing and grooving done at the same time?
"A. Not simultaneously. It is done on the same machine, but after it is dressed it is passed on to the matcher and tonguer and the groover."
Record, p. 110.

Of course the two operations are not performed by the same cylinder. One cylinder surfaces one side, another cylinder surfaces the other side. These cylinders are horizontal. Two other cylinders plane the edges or tongue and groove the edges, as the case may be, and these cylinders are vertical and are usually placed beyond the surfacing cylinders. But the machine is all one and the process is all

one, although the treatment of the edges may occur an instant after that of the surfaces.

It is also true that all planing machines do not perform all these different processes. A planer may be constructed with a view to surfacing merely one side and nothing else, or both sides and nothing else, or it may perform all the different operations, and the cost of the machine usually depends upon its complexity, but it is always one machine and is always known as a planing machine (Record, pp. 163, 173).

V.

The incidents upon which the Government relies to control the classification of this lumber have no weight.

1. Great stress was laid upon the fact that the lumber was of a given length. Upon pages 6, 7, and 8 of the Record we have, among other things, a minute of the orders to fill which the different cars were sent. The order for the first car was "1 car, P. 1 S. & M., dried and well dressed"—that is, the customer ordered one car-load of boards, planed on one side and matched or tongued and grooved. Not one word is said about the length or the width of any single piece in that car, and in all probability it was not of the slightest consequence to the customer what the length or width of any single piece was. In filling that order the mill sent a certain number of pieces four inches wide and twelve feet long and a certain number four inches wide and sixteen feet long, &c. The invoice which accompanied the car, or probably which was

sent to the customer, shows the number of pieces, the length, and the width of each piece. That was done, however, not in obedience to the wishes or wants of the customer, but for the mutual convenience of the mill and the customer, as the best way of tallying the quantity of lumber sent. If the car-load had been composed of rough lumber of any kind whatever it would have been tallied in exactly the same way and an invoice of exactly the same sort would have been sent.

The same thing is true of three car-loads of plank. The orders simply call in each case for one car-load to be worked from a mill run of the cut of the year 1895 and to be planed one side and matched. Nothing is said here about widths or lengths. The invoice simply shows what widths and what lengths were actually sent. The orders for the remaining four cars required that the plank should be butted to exact lengths. The width is not specified. In billing these orders the two lengths sent were ten and twenty feet. These planks were to be used for the purpose of laying under floors in factory buildings. It is probable that in constructing such mills the floor joist are placed a uniform distance apart, and these planks are required of a uniform length, so that they can be laid down and nailed in place to receive the upper floor without further preparation.

Does that make them any the less lumber? Suppose they had been butted to exact lengths for exactly that purpose and planed on one side without being grooved, does the Government contend that they would have been something else than lumber and not entitled to free entry under paragraph 676? Not at all. The claim is, not that the making of them the exact length, but that the treatment of the edges

by grooving, takes them out of the free list and puts them under some dutiable classification.

The testimony shows that rough lumber is usually manufactured to an exact length for the same reason that these factory floors are so made. It is probably done much oftener than in case of dressed lumber, for in most instances dressed lumber requires some additional fitting with the saw of the carpenter before it can be used, whereas rough lumber can often be put up without such fitting. A fence board is of a certain length, so that it may be nailed onto the posts without any further preparation. The boards used in covering the outside of a house before the clap-boards are laid on are of a given length, so that they may be put on without the labor of fitting, but nobody ever thought that they were any the less lumber or any the less entitled to free entry. It is evident that the mere fact that these pieces were finished to an exact length is immaterial.

2. Some stress is also laid upon the fact that they are a given width, but this seems to be entirely for the convenience of the trade. In no case under consideration does the order itself specify the width, and in no case apparently is it at all material what the width is. Certainly no significance can be attached to this circumstance.

3. The Government seems to attach the most importance to the fact that these importations are known in the trade by a specific name. The inch boards are commonly called flooring and the plank factory flooring and factory roofing. They are, it is said, flooring, not dressed lumber.

This entirely misapprehends that use of the term "dressed" which the appellee insists should be applied in this case. To dress lumber is to fit it for these various uses. The name indicates the use to which it has been adapted by the process of dressing. Flooring is dressed lumber; sheathing, ceiling, casing—all this is dressed lumber, and has not ceased to be such by reason of the fact that it is known in the trade under these different names. A rafter is none the less rough lumber because it is bought and sold as a rafter, nor does a fence board cease to be entitled to free entry under paragraph 676 because it is called a fence board.

VI.

The plain intent of the act of 1894 was to admit all lumber, except certain specified cabinet woods, free of duty. This is accomplished by giving to the word "dressed" in paragraph 676 the signification claimed by the appellee.

The following are the first seven sections from the wood free list, U. S. Stat. at Large, vol. 28, p. 545:

"672. Logs, and round manufactured timber not specially enumerated or provided for in this act.

"673. Firewood, handle bolts, heading bolts, stave bolts, and shingle bolts, hop poles, fence posts, railroad ties, ship timber, and ship planking, not specially provided for in this act.

"674. Timber, hewn and sawed, and timber used for spars and in building wharves.

"675. Timber, squared or sided.

"676. Sawed boards, plank, deals and other lumber, rough

or dressed, except boards, plank, deals and other lumber of cedar, lignum vitæ, lancewood, ebony, box, granadilla, mahogany, rosewood, satinwood, and all other cabinet woods.

"677. Pine clap-boards.

"678. Spruce clap-boards."

Is it possible to read the above sections and still believe that articles like those under consideration are dutiable? Does it not appear from the context itself that the words "rough or dressed" are used in the broad sense of two general classes into which all lumber falls? Was it not the manifest intent of the law-maker to admit free of duty all lumber, whether in its rough state or whether so altered as to be adapted to the purposes for which lumber in its finished state is ordinarily used? These inch boards were still boards. Nobody would for a moment call them anything else. These planks were still planks. The Government does not deny this. In other words, they were still *lumber*, and by the plain and unambiguous language of the statute they are free.

VII.

The importations were not manufactures of wood under paragraph 181.

If these imports are not properly classified under paragraph 676 of the free list, what is their classification? The general appraisers said they were manufactures of wood and dutiable under paragraph 181. Such was evidently the idea of the Government witnesses and of the attorneys employed

to represent the Government in the early history of this proceeding.

The entire wood schedule consists of four sections and is given here, U. S. Stat. at Large, vol. 28, p. 521:

"179, Osier or willow, prepared for basket-makers' use, twenty per centum ad valorem; manufactures of osier or willow, twenty-five per centum ad valorem; chair cane, or reeds, wrought or manufactured from rattans or reeds, ten per centum ad valorem.

"180. Casks and barrels, empty, sugar box-shooks, and packing boxes and packing box-shooks, of wood, not specially provided for in this act, twenty per centum ad valorem.

"180½. Tooth picks of vegetable substance, thirty-five per centum ad valorem.

"181. House or cabinet furniture, of wood, wholly or partly finished, manufactures of wood, or of which wood is the component material of chief value, not specially provided for in this act, twenty-five per centum ad valorem."

It is admitted that these importations are still lumber, and that fact of necessity excludes the idea that they are manufactures of wood, for when lumber becomes a manufacture it ceases to be lumber. The lumber of which a wood table is composed was no longer lumber when it became a table. A manufacture of wood is lumber which has been so wrought upon that it ceases to be lumber and becomes something else. There are doubtless many instances in which it might be difficult to say whether the thing was still lumber or whether it had become in fact a manufacture of wood, but these importations present no such difficulty.

This idea is illustrated by the case of Hartranft *vs.* Wiegman, 121 U. S., 615. The question there was whether certain shells which had been etched or ground or otherwise treated upon the surface to produce certain results had become a manufacture. The court held that they had not;

that they were still shells. Work had been expended upon them; the value of the shell had been increased, but the thing still remained a shell and was dutiable as a shell. The court in that case said (p. 615): "They were still shells. They had not been manufactured into a new and different article, having a distinctive name, character, or use from that of a shell. The application of labor to an article, either by hand or by mechanism, does not make the article necessarily a manufactured article within the meaning of that term as used in the tariff laws."

These importations had not become anything other or different from lumber. They had not been designated and set apart as part of a particular thing. Consider, for instance, the planed and matched inch boards. The testimony shows that lumber for many purposes is planed and matched in exactly the way these were. If a log run of boards had been put through that same machine at the same time, the various uses to which that product would have been put depend upon the quality of the lumber itself, not upon the way in which it is dressed. According to its grade, some of it might have been used for a top floor, some of it for a floor lining, some of it to sheathe the inside of a room or to board the outside of a house. In fact, there is hardly any purpose to which a planed board could be put that would not be answered by the material which composed that car-load.

VIII.

The importations cannot be classified under section 3.

It seems to have occurred to counsel for the Government, upon an examination of the record, that it would be impossible to classify the imports in question under paragraph 181. Certainly there was no other paragraph in the wood schedule which was at all applicable to them. If they were dutiable at all, therefore, it followed that they must be classified under section 3, which includes articles accidentally omitted in the preparation of the various schedules.

If the claim of the Government that these imports should be classified as a manufacture of wood was remarkable, the claim that they ought to be classified under section 3, as something which escaped the notice of Congress altogether, is astounding. It must be borne in mind that imports like these are not an occasional affair. They are matters of everyday occurrence. One of the witnesses for the Government testified that he had manufactured millions of feet of factory flooring. It appears from the testimony of the other Government witnesses that they own immense plants for the manufacture of lumber into those forms which it is sought to exclude from the United States by the application of this tariff. Millions upon millions of feet of lumber are dressed every year which would be made dutiable upon the contention of the Government and free upon the claim of the appellee. As will be seen in a moment, there is no tariff,

beginning with that of 1872, in which tongued-and-grooved lumber has not been made subject to duty *eo nomine*. The present act as it passed the House contained a paragraph which imposed a duty upon lumber so dressed. Few subjects were more discussed before the committee than this very question, whether lumber like that involved in this case and of similar kinds should be placed upon the free list or should be made dutiable. Yet we are forced to conclude, if the contention of the Government is sustained, that Congress finally entirely overlooked this great subject of commerce. Certainly the court will not presume that it was overlooked if by any reasonable construction it can arrive at the other conclusion.

IX.

The history of the act in Congress shows that the contention of the appellee is right.

If any doubt can remain as to the sense in which the word "dressed" is used in paragraph 676, it must be dispelled by an examination of the progress of the act through Congress. While the statements of individual members of Congress made in debate upon the floor are not admissible upon the interpretation of a statute, it is well settled that the history of the measure in Congress, the state of the times in which the law was enacted, and the purposes in view in its enactment may be properly considered.

American Net and Twine Co. *vs.* Worthington, 141 U. S., 468, 473.

Blake *vs.* National Bank, 23 Wallace, 318.

The act of 1872, in the wood schedule, provided for "sawed boards, plank, deals and other lumber of hemlock, white-wood, sycamore and bass-wood, one dollar per thousand feet board measure. * * * *Provided*, That when lumber of any sort is planed or finished, in addition to the rates herein provided there shall be levied and paid for each side so planed or finished fifty cents per thousand feet; and if planed on one side and tongued and grooved, one dollar per thousand feet; and if planed on two sides and tongued and grooved, one dollar and fifty cents per thousand feet." The act of 1883 was identical in this particular with that of 1872. The act of 1890 provided in the wood schedule for "sawed boards, plank, deals and other lumber of hemlock, white-wood, sycamore, white-pine, and bass-wood, one dollar per one thousand feet board measure. * * * But when lumber of any sort is planed or finished, in addition to the rates herein provided, there shall be levied and paid for each side so planed or finished, fifty cents per one thousand feet board measure, and if planed on one side and tongued and grooved, one dollar per thousand feet board measure; or if planed on two sides and tongued and grooved, one dollar and fifty cents per thousand feet board measure."

Since 1872, therefore, the tonguing and grooving of lumber had increased the duty fifty cents per thousand feet, board measure.

As the present statute originally passed the House of Representatives, it contained paragraph 181 exactly as it now stands. Paragraph 676 covered "sawed boards, plank, deals and other lumber," but did not contain the words "rough or dressed." Paragraph 178 provided for "lumber of any sort, planed or finished. For each side so planed or finished,

fifty cents per thousand feet board measure; and if planed on one side and tongued and grooved, one dollar per thousand feet board measure; and if planed on two sides and tongued and grooved, one dollar and fifty cents per thousand feet board measure" (Tariff bill, H. R. 4864, February, 1894).

In the Senate, upon motion of Senator Allen, of Nebraska, paragraph 178 was stricken out and there were added to paragraph 676 the words "rough or dressed" (Congressional Record, vol. 26, pp. 5504, 6564–'5, 7106). Can any other inference be made than that in striking out paragraph 178 and adding these words to 676 the purpose was to make free under 676 what was dutiable under 178?

It should be noted in this connection that in previous tariff legislation the word "planed" had been invariably used to designate the smoothing of lumber on one or both sides, and that was the word employed in paragraph 178. If Congress had purposed to admit free merely lumber that was smoothed, as the Government contends, it would have used the word "planed," not "dressed."

It is well understood that the act of 1894 was enacted as a free-trade measure, and that its purpose was to reduce the duty upon articles of general consumption. The articles in question are of universal use. That is especially true of the tongued and grooved boards. At no time since 1872 had the fact that the edges of boards were tongued and grooved increased the duty more than fifty cents per thousand feet, board measure. It appears from the specifications already referred to that the value of this lumber was about $10 per thousand feet. The duty imposed would therefore be $2.50 per thousand feet. That is to say, this tariff act increased the duty upon this article of prime necessity five fold more

than it ever had been under any system of protective duties. If the Fifty-third Congress actually enacted such a measure, it must, of course, be enforced, no matter how severely it may bear upon individuals or industries; but will the court come to the conclusion that such was the intention so long as any other reasonable course is open to it?

X.

If the question is doubtful, that doubt should be resolved in favor of the appellee.

American Net and Twine Co. *vs.* Worthington, 141 U. S., 468.

Hartranft *vs.* Wiegman, 121 U. S., 609.

United States *vs.* Isham, 17 Wall., 496, 504.

C. A. Prouty,
Of Counsel.